SW → File

Bullch 169

[5 Hon]

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CJSA/2342/2001

SOCIAL SECURITY ACTS 1992-1998

APPEAL FROM DECISION OF AN APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: Mr C. Turnbull

Claimant	:	**Ms. Hazel Heavens**
Tribunal	:	**Milton Keynes**
Tribunal Case No	:	**U/42/043/2001/00033**
Date of Tribunal Hearing	:	**27 March 2001**

1. This is an appeal by the Claimant, brought with the leave of the Chairman, against a decision of the Milton Keynes Appeal Tribunal made on 27 March 2001. My decision is set out in paragraph 18 below.

2. The Claimant is a woman now aged 48 who claimed jobseeker's allowance from 17 November 2000. On 4 December 2000 a decision maker decided that the Claimant was not entitled to jobseeker's allowance because she did not satisfy the contribution conditions. Records of her National Insurance account showed that no contributions had been paid in either of the tax years relevant to the claim.

3. The Claimant appealed, contending that she had worked as a book-keeper from April 1994 to 31 August 2000 and that her employer had deducted national insurance contributions from her salary but had not passed them on to the Inland Revenue. There were before the Tribunal three pay slips which showed contributions having been deducted.

4. The Secretary of State's written submission to the Tribunal stated that "enquiries by the Benefits Agency into the non-payment of National Insurance, through the Inland Revenue, are continuing."

5. The Tribunal dismissed the appeal. Its reasons included the following:

> "Evidence from the Secretary of State .... shows that no class 1 contributions have been paid or credited for the tax years ending on 5 April 1998 and 5 April 1999. [The Claimant] produced no evidence to the Tribunal that the Inland Revenue had actually collected for the department of Social Security contributions from ETS (Sales) Ltd in respect of herself. It appears to the tribunal (and this was not disputed by [the Claimant]) that if ETS (Sales) Ltd had actually collected contributions from [the Claimant] that they had failed to send the contributions to the Inland Revenue.
>
> [The Claimant] produced no evidence to the Tribunal that she was being treated by the Inland Revenue as having paid the contributions pursuant to Regulation 39 of the Social Security (Contributions) Regulations 1979 as amended.
>
> Therefore, pursuant to Regulations 38(5) and (6) of the Social Security (Contributions) Regulations 1979 as amended, contributions give no entitlement to benefit until they have actually been paid and in respect of contribution based jobseeker's allowance, until 6 weeks after they have been paid.
>
> Accordingly, [the Claimant] is not entitled to contribution based jobseeker's allowance from 17 November 2000 because she does not satisfy the contribution conditions for the relevant years being those ending 5 April 1998 and 5 April 1999."

6. The Claimant appeals on the ground that the Tribunal failed properly to apply Reg. 39 of the Social Security (Contributions) Regulations 1979 ("the 1979 Regulations"), which provides that where delay or failure to pay a primary Class 1 contribution payable on a primary contributor's behalf by a secondary contributor

> "is shown to the satisfaction of the Secretary of State not to have been with the consent or connivance of, or attributable to any negligence on the part of, the primary contributor, the primary contribution shall be treated"

as paid.

7. The Claimant contends that the Tribunal should have made a finding that the failure by her employer to pay the contributions was not with her consent or connivance, or attributable to any negligence on her part, and thus that Reg. 39 should have been applied. However, the question arises whether the Tribunal had any jurisdiction to decide that issue.

8. S. 8(1) of the Social Security Act 1998 ("the 1998 Act") provides that it shall be for the Secretary of State

> "(a) to decide any claim for any relevant benefit [which includes jobseeker's allowance]:
>
> (b) ..... ;
>
> (c) subject to subsection (5) below, to make any decision that falls to be made under or by virtue of a relevant enactment" [which includes the Social Security Contributions and Benefits Act 1992 and the Jobseekers Act 1995]

9. S. 8(5) of the 1998 Act provides that subsection (1)(c) does not include any decision which under section 8 of the Social Security Contributions (Transfer of Functions, etc) Act 1999 ("the 1999 Act") falls to be made by an officer of the Board of Inland Revenue.

10. Under s.12 of the 1998 Act there is a right of appeal to an appeal tribunal from decisions of the Secretary of State, save in excepted cases.

11. S.8(1) of the 1999 Act provides that it shall be for an officer of the Board of Inland Revenue

> "(b) to decide whether a person is or was employed in employed earner's employment for the purposes of Part V of the Social Security Contributions and Benefits Act 1992 (industrial injuries),
>
> (e) to decide whether contributions of a particular class have been paid in respect of any period."

12. An issue arises, it seems to me, whether a decision under Reg. 39 of the 1979 Regulations as to whether contributions are required to be <u>treated</u> as having been paid

is a decision "whether contributions of a particular class have been paid", within the meaning of s.8(1)(e) of the 1999 Act, and so a decision which fell to be made by the Board of Inland Revenue. In my judgment it is. That is in my judgment the natural construction of s.8(1)(e). Further, I would be disposed to give s.8(1)(e) a fairly broad construction because questions of what contributions were actually received by the Inland Revenue and questions whether they should be treated as paid under Reg. 39 may well involve overlapping issues of fact. To have those two questions being determined by different adjudicating authorities would I think therefore be capable of producing substantial inconvenience.

13. The Secretary of State, in response to a Direction which I made raising this issue and drawing attention to its potential general importance, has made a submission in support of the conclusion which I have just reached. He did not, however, refer me (and nor did I in my Direction refer him) to the recent decision of Mr. Deputy Commissioner Goodman in CI/7507/1999. He had to decide whether a decision whether a person fell within s.115(3) of the Social Security Contributions and Benefits Act 1992 was a decision falling within s.8(1)(b) of the 1999 Act. S.115(3) provides:

> "Employment as a member of Her Majesty's forces and any other prescribed employment under the Crown are not, and are not to be treated as, employed earner's employment for any of the purposes of Part V of this Act."

14. He decided that it was not, accepting the following submission from the Secretary of State:

> "The question in this case is not whether or not the claimant was an employed earner, which would be for consideration by the Inland Revenue. The question is whether or not the claimant should be treated as an employed earner for the purposes of the industrial injuries scheme, according to the provisions of section 115(3) of the Social Security Contributions and Benefits Act 1992. Since the legislation at issue is social security legislation, this case should in my view, be considered by the social security authority."

15. The issue before me is strikingly similar to that which was before Mr. Deputy Commissioner Goodman. However, it is not precisely the same, because he was concerned with the scope of s.8(1)(b) of the 1999 Act, whereas I am concerned with the scope of s.8(1)(e). Further, the issue in his case as to whether the claimant fell within s.115(3) of the 1992 Act (which he held was for decision by the Secretary of State) was a self-contained one which did not raise any danger of factual issues overlapping those which might fall for decision by the Inland Revenue under s.8(1)(b). I do not therefore find his decision or reasoning to be of much assistance on the issue before me, and nor do I find it necessary to say whether I think that his decision was correct.

16. In my judgment, for the reasons which I have given above, the Reg. 39 question was for decision by the Board of Inland Revenue (as indeed was the question what contributions had actually been paid to it, although it does not seem that any issue on

that really arises). The effect of that conclusion is that the Tribunal had no jurisdiction to decide the Reg. 39 question.

17. Further, in those circumstances, by s. 38A(1) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 ("the 1999 Regulations") the Tribunal was required (a) to refer the appeal to the Secretary of State pending the decision of the contributions issues by an officer of the Board of Inland Revenue and (b) to require the Secretary of State to refer those issues to the Board.

18. I therefore allow the Claimant's appeal and set aside the Tribunal's decision as erroneous in law. I (a) direct that the Claimant's appeal to the Tribunal be referred to the Secretary of State pending the decision of the contributions issues by an officer of the Board and (b) require the Secretary of State to refer those issues to the Board.

19. By s.38A(3) of the 1999 Regulations, when the contributions issues have been finally determined, the Secretary of State will have to consider whether to revise or supersede the decision of 2 December 2000 refusing jobseeker's allowance, and if not the Claimant's appeal against that decision must be restored for redetermination by a new appeal tribunal not consisting of or including the person who was the sole member of the Tribunal. I envisage, however, that there will in practice be nothing of substance left for a new appeal tribunal to decide.

(Signed) Charles Turnbull
(Commissioner)

(Date) 14 March 2002